

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MIC:DET:TL-N-2524-99

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JUN 21 1999

date:

to: District Director, Michigan District  
Chief, Examination Division  
Attn: Raymond Mayhall, Revenue Agent, Group 1517

from: District Counsel, Michigan District, Detroit

subject:

Timeliness of Claim for Refund

This memorandum is in response to your request for our advice with regard to the above-subject.

DISCLOSURE STATEMENT

This document may contain taxpayer information subject to the provisions of I.R.C. § 6103. This document may also include confidential information subject to the attorney-client and deliberative process privileges, and may also have been prepared in anticipation of litigation. Therefore, this document should not be disclosed to anyone outside the Internal Revenue Service, including the taxpayer involved, and its use within the Service should be limited to those with a need to review the document in relation to the subject matter or case discussed herein.

ISSUE

Whether the taxpayer may file a claim for refund carrying back a general business credit from a closed year to an open year, when the general business credit was not claimed on the closed year's original return or timely filed amended return.

CONCLUSION

Pursuant to Rev. Rul. 82-49, 1982-1 C.B. 5, the general business credit may be carried back without it being claimed on either an original or timely filed amended return, so long as it is carried back to an open year. Thus, in this case, since the [REDACTED] tax year was open at the time the taxpayer filed its "protective" claim for refund, the claim carrying back the general business credit from the [REDACTED] tax year is timely.

FACTS

The facts are as set forth in your memorandum dated December 15, 1998, and as discussed with Revenue Agent Raymond Mayhall on May 17, 1999.

On [REDACTED], [REDACTED], (hereinafter referred to as [REDACTED]), filed an amended tax return, Form 1120X, for the year ended May 31, [REDACTED] carrying back a general business credit from the tax year ended May 31, [REDACTED]. The Form 1120X, (hereinafter referred to as the protective claim), was identified by [REDACTED] as a "Protective Refund Claim", and sought a refund, (line 4), in the amount of \$[REDACTED] "or such greater amount as is legally refundable." Page 2 of the protective claim explained the adjustment on line 4 as follows: "TAX DECREASED DUE TO CARRYBACK OF GENERAL BUSINESS CREDIT FROM TAX YEAR ENDING MAY 31, [REDACTED]. SEE ATTACHED FORM 6765 - CREDIT FOR INCREASING RESEARCH ACTIVITIES FOR YEAR ENDING MAY 31, [REDACTED] FOR DETAILS OF THE CREDIT. ALSO SEE ATTACHED COVER LETTER FOR DETAILS OF PROTECTIVE REFUND CLAIM." The "cover letter" attached to the protective claim explained that [REDACTED] was increasing its [REDACTED] general business credit from the original return to reflect its entitlement to increased research credit pursuant to I.R.C. § 41(a). The letter further explained that since the credit pertaining to the [REDACTED] tax year was limited pursuant to I.R.C. § 38(c) and, thus, was not available to offset the tax due for that year, it was being carried back three years to the [REDACTED] tax year, in accordance with the provisions of I.R.C. § 39(a).

After obtaining a six months extension, [REDACTED] timely filed its return for the year ended May 31, [REDACTED] on [REDACTED]. This return did not reflect any deductions for research and experimentation expenses or research credit. On [REDACTED] [REDACTED] filed an amended return, Form 1120X, for the tax year ended May 31, [REDACTED] (hereinafter referred to as the [REDACTED] claim), claiming a credit for its research activities. On the same date, [REDACTED] also filed a Form 1120X for the tax year ended May 31, [REDACTED] perfecting the claim filed earlier for that year. This 1120X requested a refund, (line 4), in the amount of \$[REDACTED] or

"such greater amount as is legally refundable." On page 2 of the Form 1120X, the adjustment on line 4 was explained as follows: "Tax decreased due to carryback of General Business Credit from tax year ending May 31, [REDACTED]. See attached detail. This amended return is being filed in perfection of a protective refund claim previously filed on [REDACTED]. See cover letter attached to this return for additional details relating to the perfection of this claim for refund."

Pursuant to [REDACTED]'s transcript of account, the Assessment Statute Expiration Date (ASED) for the year ended [REDACTED], is [REDACTED]. [REDACTED] was audited for the years ended May 31, [REDACTED] through May 31, [REDACTED], with the years [REDACTED] through [REDACTED] being closed agreed. The additional tax proposed for these years was paid on [REDACTED].

Subsequent to the filing of the protective claim, the revenue agent determined that the tax computation made for the audit of the [REDACTED] tax year was incorrect. Specifically, [REDACTED]'s regular tax was understated by the amount of \$[REDACTED] and its alternative minimum tax (AMT) was overstated by the same amount. As a result of this error, [REDACTED]'s AMT credit for the [REDACTED] year was overstated by the amount of \$[REDACTED]. During our conversation with Revenue Agent Raymond Mayhall on May 17, 1999, he informed us that he is proposing to disallow the AMT credit and he has not met with any resistance from [REDACTED]. In computing the regular tax on the Form 1120X filed for the year ended May 31, [REDACTED] in arriving at taxable income, made the adjustment required by I.R.C. § 280C(c)(1), and added back the amount of the research credit. Conversely, [REDACTED] did not make the I.R.C. § 280C(c)(1) adjustment in computing its alternative minimum taxable income. Pursuant to PLR 9722005, the revenue agent disagreed with [REDACTED]'s computation. He then recomputed the tax liability for the [REDACTED] tax year by making the I.R.C. § 280C(c)(1) adjustment in arriving at the alternative minimum taxable income. This resulted in an additional deficiency for the tax year ended May 31, [REDACTED] in the amount of \$[REDACTED].

By memorandum dated December 15, 1998, Revenue Agent Mayhall requested the advice of this office regarding whether the claims filed by [REDACTED] are timely. Mr. Mayhall does not dispute the timeliness of the protective claim. He, however, disputes whether [REDACTED] may file such a claim without first claiming the credit on either the original return or on a timely filed amended return.

DISCUSSION AND ANALYSIS

Internal Revenue Code § 6511 generally provides that a claim for refund must be filed within three years of the filing of the return or two years from the payment of tax, whichever of such periods expires later.

However, I.R.C. § 6511(d)(4)(A) contains a special period of limitations for credit carrybacks. In pertinent part, this section provides as follows:

... If the claim for credit or refund relates to an overpayment attributable to a credit carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the unused credit which results in such carryback (or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, the period shall be that period which ends 3 years after the time prescribed by law for filing the return, including extensions thereof, for such subsequent taxable year) or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later.

In this case, [REDACTED] filed the protective claim on [REDACTED], prior to the expiration of the statute of limitations for the [REDACTED] unused credit, tax year. Thus, the protective claim was timely filed, and the only issue remaining is whether the failure to claim the credit on the [REDACTED] original return or on a timely filed amended return for that year invalidates the claim.

In Rev. Rul. 82-49, 1982-1 C.B. 5, the internal Revenue Service considered the same issue involved in this case. Although the revenue ruling involved a carryforward instead of a carryback, that fact does not alter the result.

In that revenue ruling, the Internal Revenue Service considered whether the failure to claim an investment tax credit on the original return or in a timely filed claim for refund would prohibit the taxpayer from carrying over the credit from a closed year to a succeeding open tax year. After considering the relevant sections of the Internal Revenue Code and its previous ruling, especially Rev. Rul. 81-88, 1981-1 C.B. 585, the Service held that "while section 6511 of the Code bars refunds for years in which the period of limitations for claiming the refund has expired, it does not bar the making of a claim for refund based on a carryover of investment tax credit under section 46(b) to an open year... The investment tax credit ... need not have been claimed on an income tax return for the year the property was placed in service, before the investment tax credit can be carried over under section 46(b) of the Code to an open year."

Likewise in this case, [REDACTED] was not required to claim the research credit on its original return for [REDACTED], or on a timely filed claim for refund for that year before it can carry it back to the open [REDACTED] tax year.

Although your memorandum does not raise the issue of whether the protective claim is invalid because it was labeled as such and did not include a specific amount, we believe this issue warrants some discussion since it is directly related to the issue posed above.

The general requirements for a valid claim for refund are set forth in Treas. Reg. § 301.6402-2. In addition to the time requirements discussed above and requirements not applicable here, this provision further requires that "the claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. § 301.6402-2(b)(1).

Although the protective claim filed in this case was labeled as such and did not set forth a specific amount, it did include sufficient enough facts enabling the Service to rule on the claim. In addition to providing more than adequate explanations, the protective claim included various forms and schedules fully setting forth the basis upon which [REDACTED] was relying.

Accordingly, the protective claim filed on [REDACTED] [REDACTED], is a timely and valid claim and should be allowed.

It should be noted that unless the computational error for the tax year ended May 31, [REDACTED], affects the amount of the carryback, the Internal Revenue Service is likely barred from assessing and collecting the additional deficiency re-computed for that year.

This advice was coordinated with our National Office.

We hope that the above fully addresses all your concerns regarding this case. However, should you have any questions or require any additional assistance, please feel free to contact the undersigned at (313) 226-2041.

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District Counsel

By:

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